



THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

JUDGEMENT ON BEHALF OF THE REPUBLIC OF LATVIA Riga, 18 October 2012 in Case No. 2012-02-0106

The Constitutional Court of the Republic of Latvia, composed of the Chairperson of the Court Hearing Gunārs Kūtris, Justices Kaspars Balodis, Aija Branta, Kristīne Krūma, Uldis Ķinis and Sanita Osipova,

having regard to the application submitted by the Administrative District Court of the Republic of Latvia,

on the basis of Article 85 of the Satversme of the Republic of Latvia and Section 16(1) and Para 9 of Section 17(1), as well as Section 19¹ and Section 28¹ of the Constitutional Court Law

on 18 September 2012 at a court hearing examined in written procedure the Case

“On compliance of the words “and a fine in accordance with the Law on Taxes and Fees” of Section 33(5) and Section 33(7) of the law “On Excise Duties” with the second sentence of Article 92 of the Satversme of the Republic of Latvia and Article 4 of the Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms”.

The facts

1. On 30 October 2003 the Saeima of the Republic of Latvia adopted the law “On Excise Duties”.

Section 33(5) and Section 33(7) of the law “On Excise Duties provide”:

“(5) Confiscation of excisable goods for violations of this Law or other regulatory enactments or application of other regulatory enactments in respect of violations in the circulation of excisable goods shall not exempt the specific person from liability to pay duty in accordance with this Law and a fine in accordance with the Law On Taxes and Fees. The State Revenue Service shall not calculate the duty and fee for confiscated excisable goods that do not exceed the following amount:

1) alcoholic beverages:

a) intermediate products and other alcoholic beverages – 5 litres,

b) beer, wine and fermented beverages – 30 litres;

2) tobacco products:

a) cigarettes – 300 cigarettes,

b) cigars or cigarillos – 900 cigars or cigarillos,

c) smoking tobacco – 500 grams;

3) mineral oil products – 40 litres;

4) non-alcoholic beverages – 500 litres;

5) coffee – 20 kilograms.

(7) If a person performs any operation with excisable goods without complying with the provisions of this Law (including undeclared or other importation in the State of excisable goods without complying with the importation procedures specified in regulatory enactments or without fulfilling the relevant customs procedures, performs unregistered or other production of excisable goods without complying with the procedures specified in regulatory enactments for the production of excisable goods,

performs any other activities with excisable goods for which duty has not been paid or security provided for by this Law has not been submitted or which have not been labelled with excise duty stamps in accordance with this Law), the State Revenue Service shall collect by uncontested procedures into the State budget in accordance with the duty rates specified in this Law, the unpaid amounts of the duty and a fine in accordance with the Law On Taxes and Fees.”

2. The Administrative District Court of the Republic of Latvia (hereinafter – the Applicant), hearing the Case No. A420568610, initiated on the basis of an application by V.Ļebedevs regarding revoking the decision of 14 January 2010 by the Director General of the State Revenue Service No. 22.4/1777, concluded that the words “and a fine in accordance with the Law on Taxes and Fees” of Section 33(5) and Section 33(7) of the law “On Excise Duties” (hereinafter – the contested norms) are non-compliant with the second sentence of Article 92 of the Satversme of the Republic of Latvia (hereinafter – the Satversme) and Article 4 of Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the Convention), and decided to apply to the Constitutional Court.

It was established in the framework of the administrative case examined by the Administrative Court that V.Ļebedevs had been made administratively liable for committing an offence envisaged by Section 201¹² of Latvian Administrative Violations Code (hereinafter – AVC) – smuggling, a fine in the amount of 70 LVL was set and 1180 packages of cigarettes were confiscated. The State Revenue Service also conducted a tax audit, as the result of which additional payments to be made by V.Ļebedevs into the State budget were calculated – the unpaid excise tax 1133.51 LVL, fine 566.76 LVL and late payment penalty 45.34 LVL.

The Applicant holds that the contested norms allow punishing a person pursuant to two legal norms. The administrative penalty envisaged by Section 201¹² of AVC and the fine prescribed by Section 32 of the Law on Taxes and Fees are applied for one and the same infringement, i.e., importing into the State undeclared excisable goods, evading customs control and without paying the tax. Thus, the contested norms collide with the principle of inadmissibility of double jeopardy (hereinafter also – *ne*

bis in idem), which follows from Article 92 of the Satversme and Article 4 of Protocol No. 7 to the Convention.

The Applicant notes that Article 4(1) of Protocol No. 7 to the Convention establishes a person's right not to be tried and punished twice for the same offence. The administrative penalty envisaged in Section 201¹² of AVC and the fine envisaged in Section 32 of the Law on Taxes and Fees should be considered as criminal punishment in the understanding of the Convention, since their aim is to punish the offender and to prevent other similar offenses. Article 4 of Protocol No.7 to the Convention should be understood as a prohibition to accuse of or to try for other "offence", insofar as it is caused by identical facts or facts, which are the same. The point of departure regarding the issue, whether the application of both punishments is based upon facts, which are the same or essentially the same, are the established facts included in the final rulings of both procedures.

The Applicant holds that the principle of inadmissibility of double jeopardy follows also from the second sentence of Article 92 of the Satversme. The Constitutional Court, interpreting the words "in accordance with law" in the second sentence of Article 92 of the Constitution, has recognised that they include not only the presumption of innocence, but also other legal principles. The Applicant concludes that this norm contains also the principle of the inadmissibility of double jeopardy. Therefore the contested norms are incompatible not only with Article 4 of Protocol No. 7 to the Convention, but also with the second sentence of Article 92 of the Satversme. The fact that the principle of the inadmissibility of double jeopardy is not directly mentioned in the text of Article 92 of the Satversme is not sufficient grounds for holding that it does not fall within the scope of this Article, and, obviously, this principle belongs to the right to fair court.

3. The institution, which adopted the contested norms – **the Saeima of the Republic of Latvia** (hereinafter – the Saeima) – does not uphold the Applicant's opinion and holds that the contested norms comply with the legal norms of higher legal force.

The Saeima does not uphold the expanded interpretation of the second sentence of Article 92 of the Satversme offered by the Applicant, i.e., that the principle of the inadmissibility of double jeopardy follows from this norm. The legislator had a clear aim in including the respective norm in the text of the Satversme – to envisage constitutional safeguards for the principle of the presumption of innocence. Also the case law of the Constitutional Court thus far contains the analysis of the second sentence of Article 92 of the Satversme only in the context of the presumption of innocence. In view of the fact that the principle of inadmissibility of double jeopardy has been defined in Article 4 of Protocol No. 7 to the Convention, it should be included in the system of Satversme through the interpretation of Article 89 of the Satversme, not through broadening the scope of the second sentence of Article 92 of the Satversme.

The Saeima notes that in assessing the compliance of the contested norms with Article 4 of Protocol No. 7 to the Convention, the interpretation of the respective norm provided by the European Court of Human Rights (hereinafter - ECHR) should be taken into consideration.

Considering the criteria defined in the ECHR case law, the Saeima upholds the Applicant's opinion that the punishment envisaged in Section 201¹² of AVC and the fine envisaged in Section 32 in the Law on Taxes and Fees is to be considered as criminal punishment in the understanding of Article 4 of Protocol No. 7 to the Convention. However, the Saeima does not uphold the opinion that V.Ļebedevs had been punished twice for the same offence.

ECHR has recognised that Article 4 of Protocol No. 7 to the Convention contains a prohibition to bring charges for or try for a second “offence”, insofar it arise from identical facts or facts, which are substantially the same. Thus, it must be assessed whether the facts, which form the totality of concrete s circumstances, in which the accused is involved, are inseparably connected in space and time, i.e., whether these are the same facts. The Saeima holds that the administrative punishment, envisaged for smuggling, should be differentiated from the fine envisaged in the Law on Taxes and Fees. Even though both norms envisage punishment as the legal consequence these are applicable for two different types of offences – smuggling and not paying the excise tax.

In the case of smuggling, the object of offence are economic interests in the field of customs, the objective part – active actions aimed at moving goods subject to customs clearance over the customs border, avoiding customs control or hiding the aforementioned goods from it, without declaring them or using forged documents. The fine envisaged by Article 32 of the Law on Taxes and Fees, in its turn, is imposed for tax offences, i.e., action or failure to act, as the result of which the norms of the Law on Taxes and Fees, concrete tax laws and other regulatory enactments of the tax field, as well as the norms of European Union law are infringed. In this case the interest protected by the law is to ensure due payment of excise and other taxes into the State budget, and this interest is of principal importance and deserving legitimate protection in a democratic judicial state.

4. The summoned person – **the Ministry of Justice** – notes that the violations of the principle of inadmissibility of double jeopardy should not be examined abstractly, but within the framework of the concrete case. In assessing, whether a person has been punished twice for one and the same offence, it must be established, whether the punishment envisaged by Section 201¹² of the AVC and the fine envisaged by Article 32 of the Law on Taxes and Fees are imposed for the same offence. It follows from the application that the person, who unlawfully imported goods into the country, also evaded the obligation to pay taxes. Thus, both offences have similar features.

The Ministry of Justice upholds the opinion of the Applicant and the Saeima that the penalty envisaged by Section 201¹² of the AVC and the fine envisaged by Section 32 of the Law on Taxes and Fees are to be considered criminal punishments in the meaning of Article 4 of Protocol No.7 to the Convention. This follows from the preventive and penal function of these two punishments.

The Ministry of Justice notes that the principle of inadmissibility of double jeopardy follows from Article 50 of the Charter of Fundamental Rights of the European Union, which is binding upon Latvia. The Court of the European Union in the interpretation of the respective norm has recognised that the application of the principle of inadmissibility of double jeopardy depends upon three conditions – identical facts, the same offender and the same protected legal interests.

5. The summoned person – **the Ministry of Finance** – holds that in the concrete case the principle of inadmissibility of double jeopardy has not been violated.

The Ministry of Finance notes that in accordance with the findings of the case law of ECHR and Latvian courts the fine envisaged by Article 32 of the Law on Taxes and Fees may be equalled to a criminal punishment in the meaning of the Convention.

The punishments have different objects of legal protection. The punishment envisaged by Section 201¹² of the AVC is imposed for an administrative violation, i.e., in connection with bringing goods subject to customs clearance across the customs border, evading the customs control or hiding the aforementioned goods, or not declaring them. The fine envisaged by Article 32 of the Law on Taxes and Fees, in its turn, is imposed for tax offences, i.e., performing operations with excisable goods, decreasing the sum to be paid into the budget, i.e., for not paying the excise tax for these goods. Thus, the Ministry of Finance holds that in the concrete case two different punishments for two different offences have been applied to V.Ļebedevs.

The Ministry of Finance notes that simultaneously with committing an administrative offence (smuggling), the person's obligation to pay tax for excisable goods arises. The person has the possibility to meet the tax commitments voluntarily, before the tax audit begins. If the taxes are paid voluntarily, the fine is not calculated.

6. The invited person – **the State Revenue Service** (hereinafter – SRS) – holds that Section 201¹² of the AVC and Section 32 of the Law on Taxes and Fees envisage two different punishments for two different offences. Hence, the contested norms do not collide with the principle of inadmissibility of double jeopardy.

SRS notes that the fine envisaged by the Law on Taxes and Fees is a mandatory payment imposed as the result of tax audit regarding decreasing of the amount of tax to be paid into the budget or increasing the amount of tax to be repaid from the state budget in the tax returns submitted or to be submitted to the tax administration, or which the tax administration calculates in case the tax payer has amended the tax return or the makes the tax payment envisaged in the tax return after he has been informed that a tax inspection (audit) (audits) will be started or that the terms of conducting the tax inspection (audit) audit have been changed. The legislator's aim in adopting the

regulation on fine, had been to accustom taxpayers to discipline and prevent ungrounded decreasing of the sum to be paid into the budget or increasing the sum to be repaid from the budget, thus facilitating payment of taxes in compliance with laws. Thus, public interests with regard to social and economic measures aimed at ensuring persons' fundamental rights and the fulfilment of the State's functions are protected. The legislator has envisaged a possibility for the taxpayer to fulfil the commitments towards the state budget voluntarily, until the day tax audit begins, without paying the fine.

With regard to the administrative liability envisaged by Section 201¹² of the AVC, SRS notes that the administrative penalty is imposed to punish a person for the offence he has committed and to deter other persons from committing similar offences.

To assess *corpus delicti* of the administrative offence (smuggling), the unlawful import or export of goods must be identified. The objective part of the offence is the person's actions, which might cause harmful consequences. The loss of tax income, caused by smuggling, in the committing of this particular administrative offence, is of secondary importance.

SRS, on the basis of the aforementioned, concludes that the liability envisaged by Section 201¹² of the AVC is for the offence the person has committed on the customs border, i.e., in connection with moving goods subject to customs clearance across the customs border, evading the custom border or hiding and not declaring the aforementioned goods. However, Section 32 of the Law on Taxes and Fees envisages liability for performing operations with excisable goods, as the result of which the amount of taxes to be paid into the budget decreases.

ECHR has concluded that Article 4 of Protocol No.7 to the Convention contains prohibition to bring charges against or to try for a second "offence", insofar it is caused by identical facts or facts, which are substantially the same. The issue, whether the facts are the same or substantially the same, is reflected in the totality of actual circumstances established in the final ruling of the procedure. Moreover, ECHR has also recognised that surcharges for unpaid taxes and criminal liability for tax evasion does not cause a violation of the principle of the inadmissibility of double jeopardy.

SRS holds that in the case under review the two punishments have been applied on the grounds of different facts, and they are used to protect different legal interests,

thus a violation of the principle of inadmissibility of double jeopardy cannot be identified.

7. The summoned person – **Dr.habil.iur. Uldis Krastiņš, Professor of Criminal Law Department at the Faculty of Law, the University of Latvia** – notes that the principle of the inadmissibility of double jeopardy applies not only to the field of criminal law, but also to other offences, which as to their essence are criminal, but too petty to call for the application of the norms of criminal law and criminal procedure.

Both Section 201¹² of the AVC and Section 32 of the Law on Taxes and Fees envisage liability for such crimes, for which criminal liability is also envisaged, if the actions cause greater harm and the features of a criminal offence, envisaged by the respective norms of the Criminal law, are present. Thus, both punishments can be equalled to criminal punishments and the principle of the inadmissibility of double jeopardy can be applied to them.

U. Krastiņš also notes that the principle of the inadmissibility of double jeopardy is not linked with absolute congruence of the objective features of both offences. ECHR has recognised in its case law that a person may not be tried and punished for the same offence, if it is based on identic facts or facts, which are substantially the same. *To establish the congruence of all features and facts, it must be established, whether the offender is the same, the facts of both offences are similar and whether the same interest is protected.*

U.Krastiņš holds that in V.Ļebedev's case, only the first of the aforementioned features can be identified, i.e., both offences have been committed by the same person.

Section 201¹² of the AVC envisages liability for the formal *corpus delicti* of the offence, therefore the offence must be considered as completed at the moment it was committed. The liability envisaged by the Law on Excise Duties, however, is connected with other facts and protects other legal interests. Therefore there are no grounds to hold that a person has been punished twice for the same actions. Thus, a violation of the principle of inadmissibility of double jeopardy cannot be detected.

U. Krastiņš holds that the second sentence of Article 92 of the Satversme sets out the presumption of innocence and its linking with the principle of inadmissibility of

double jeopardy is rather conditional. The principle of the inadmissibility of double jeopardy follows from a broader legal principle – the principle of justice.

8. The summoned person – **Dr.iur. Jānis Načisčionis, Professor at Turība University** – notes that the principle of inadmissibility of double jeopardy is a tool for safeguarding human rights, which, irrespectively of the criminal law nature of the crime, guarantees that a person will not be punished twice for the same offence. The criteria mentioned in the Judgement of ECHR in Case *Engel and others versus the Netherlands* should be taken into consideration, when assessing, whether an offence falls within the jurisdiction of criminal law, which allow concluding that the offences envisaged by Section 201¹² of AVC and Section 32 of the Law on Taxes and Fees can be equalled to criminal offences in the meaning of the Convention.

J. Načisčionis holds that the administrative penalty envisaged by Section 201¹² of AVC and the fine envisaged by Section 32 of the Law on Taxes and Fees safeguard different legal interests.

9. The summoned person – **Dr.oec. Kārlis Ketners, Professor at the Department of Customs and Taxes of the Institute of International Economic Relations and Customs, Riga, Faculty of Engineering Economics and Management** – holds that the punishments envisaged by Section 201¹² of AVC and Section 32 of the Law on Taxes and Fees are appropriate for violating the customs regime, and this has caused V.Ļebedev's tax debt. Both decisions by SRS identify the same actual circumstances and refer to the same violations of regulatory enactments. It is important to take into consideration that customs control is not an end in itself and that customs regime is ensured, inter alia, for controlling the payment of taxes. If a person, unlawfully transporting goods across the border, has the aim to evade taxes, than the public interests and the aims of applying punishments in both cases coincide.

These considerations allow K.Ketners to conclude that in accordance with ECHR case law imposing the punishments envisaged by Section 201¹² of AVC and Section 32 of the Law on Taxes and Fees is incompatible with the principle of inadmissibility of double jeopardy.

The Findings

10. Until now the Constitutional Court has not assessed the compatibility of a legal norm with the principle of the inadmissibility of double jeopardy (*ne bis in idem*). Thus, first of all the content of this principle and whether it follows from the norms of the Satversme must be assessed.

The principle of inadmissibility of double jeopardy provides that a person may be tried and punished for the same offence only once.

The aim of this principle is to prevent that a person is tried and punished repeatedly, when a ruling, which is not subject to appeal, regarding the person's guilt has come into force or a person has been recognised being innocent. Hence, in applying the principle of inadmissibility of double jeopardy, the fact, whether a person during the first proceedings has been recognised as being guilty and punishment has been applied, is of no significance, since not only repeated punishment, but also repeated proceedings are inadmissible. This is a way to ensure legal stability and preclude the possibility that the same offence is adjudicated in several proceedings. Moreover, the principle of inadmissibility of double jeopardy excludes the possibility that two proceedings might arrive at different findings regarding the person's guilt. Hearing the same case at a higher instance is not considered a violation of the principle of inadmissibility of double jeopardy (*see: Harris D., O'Boyle M. and Warbrick C. Law of the European Convention on Human Rights, 2nd ed., Oxford University Press, 2009, pp. 751 – 752*).

The opinion expressed by the Saeima can be upheld, namely, that usually violations of the principle of inadmissibility of double jeopardy are assessed by examining the circumstances of concrete cases and the actions of the accused (*see Case Materials, pp. 35 – 36*). However, the aforementioned consideration does not prohibit the Constitutional Court to distance itself from the actual circumstances of the case and assess, whether two legal norms envisage liability for the same offence.

The contested norms do not envisage a punishment for a concrete offence, but set out the duty to pay the tax and the fine, irrespectively of the punishment imposed for violations in the circulation of excisable goods. The compliance of the contested norms with the legal norms of higher legal force depends upon whether the

punishments envisaged in Section 201¹² of AVC and Section 32 of the Law on Taxes and Fees are applied for the same offence or not. Thus, the Constitutional Court must assess, whether Section 201¹² of AVC and Section 32 of the Law on Taxes and Duties envisage liability for the same offence.

11. The first and the second sentence of Article 92 of the Satversme provide: “Everyone has the right to defend his or her rights and lawful interests in a fair court. Everyone shall be presumed innocent until his or her guilt has been established in accordance with law.” It follows from the case materials that the Applicant and the Saeima have different opinions regarding the connection between the principle of the inadmissibility of double jeopardy and Article 92 of the Satversme.

11.1. The Applicant has referred to the Judgement by the Constitutional Court in Case No. 2008-09-0106, in which the Constitutional Court recognised that the principle *nullum crimen, nulla poena sine lege* (a person may be recognised as being guilty and punishment can be imposed only for such actions by a person, which have been recognised by law as criminal) follows from the words “in accordance with law” in the second sentence of Article 92 of the Satversme (*see Judgement of 16 December 2008 by the Constitutional Court in Case No. 2008-09-0106, Para 4.2*). However, it must be taken into consideration that this finding is based upon the content of this principle of law and the words used in the second sentence of Article 92 of the Satversme. Thus, *per se* it cannot serve as grounds for stating that all principles of law linked with judicial proceedings, which are not *expressis verbis* included in the Satversme, follow from the second sentence of Article 92 of the Satversme.

Every person’s right to defend his or her rights and lawful interests in a fair court are enshrined in the first sentence of Article 92 of the Satversme.

The Constitutional Court, interpreting the first sentence of Article 92 of the Satversme, has recognised that the concept of “fair court” mentioned in it, comprises two aspects, i.e., “fair court” as an institution of an independent judicial power, which adjudicates the case, and “fair court” as due proceedings for adjudicating the case compatible with a judicial state. This concept in its first aspect must be interpreted in

interconnection with Chapter VI of the Satversme, in the second aspect – in interconnection with the principle of a judicial state, which follows from Article 1 of the Satversme (*see Judgement of 5 March 2002 by the Constitutional Court in Case No. 2001-10-01, Para 2 of the Findings*).

The Constitutional Court has noted that the right to fair court comprises only the guarantees for fair judicial proceedings. To establish the meaning of Article 92 of the Satversme, it must be examined in interconnection with other norms of the Satversme. A number of principles of a judicial state follow from Article 1 of the Satversme, *inter alia*, also the principle of legality, which requires that cases are examined in such a procedure as to ensure fair and objective adjudication of them, and that the outcomes of all criminal, civil and administrative proceedings were fair (*see Judgement of 11 April 2007 by the Constitutional Court in Case No. 2006-28-0, Para 12*). The Constitutional Court has also noted that “fair court” as due proceedings, compatible with a judicial state, means fair adjudication of a case. Since the outcome of a courts work is a judgement, the concept “fair court” is predominantly understood as the concept “fair judgement” (*see Judgement of 4 February 2003 by the Constitutional Court in Case No. 2002-06-01, Para 3 of the Findings*).

Not only the State’s obligation to abstain from intervening into a person’s right, but also the State’s obligation to take actions necessary for ensuring these rights follow from the Satversme (*see, for example, Judgement of 23 September 2002 by the Constitutional Court in Case No. 2002-08-01, the Findings, and Judgement of 7 October 2009 in Case No.2009-05-01, Para 9 and 10*). As regards Article 92 of the Satversme, the legislator has the positive obligation to adopt legal norms, which are necessary for fair administration of justice (*see, for example, Judgement of 5 March 2002 by the Constitutional Court in Case No. 2001-10-01, Para 2 of the Findings, and Judgement of 18 October 2007 in Case No. 2007-03-01, Para 22.3*).

Fair court as due judicial proceedings appropriate for a judicial state covers a number of interrelated rights, for example, the right to access to court, the principle of equality of parties and the adversarial principle, the right to be heard, the right to substantiated court ruling and the right to appeal (*see Judgement of 5 November 2008 by the Constitutional Court in Case No. 2008-04-01, Para 8.2, and Judgement of 17 May 2010 in Case No. 2009-93-01, Para 8.3*). Thus, the Constitutional Court has

recognised that the State's obligation to envisage legal guarantees that would ensure that the principles of legality and fairness are abided by in adjudicating cases also follows from the first sentence of Article 92 of the Satversme.

11.2. In establishing the content of the fundamental rights enshrined in the Satversme, Latvia's international commitments in the field of human rights must be taken into consideration. The international norms of human rights and their practical application on the level of constitutional law serve as a means of interpretation for determining the content and scope of fundamental rights and the principle of a judicial state, insofar this does not lead to decreasing or restricting the fundamental rights included in the Satversme (*see Judgement of 13 May 2005 by the Constitutional Court in Case No. 2004-18-0106, Para 5 of the Findings, and Judgement of 18 October 2007 in Case No. 2007-03-01, Para 11*).

The State's obligation to take into consideration the international commitments in the field of human rights follows from Article 89 of the Satversme, which sets out the obligation for the State to recognise and protect fundamental human rights in accordance with the Satversme, laws and international agreements binding upon Latvia. This article clearly shows that the constitutional legislator had the aim to achieve harmony between the norms on human rights included in the Satversme and the international norms of human rights (*see, for example, Judgement of 30 August 2000 by the Constitutional Court in Case No. 2000-03-01, Para 5 of the Findings, and Judgement 18 October 2007 in Case No. 2007-03-01, Para 11*).

The Constitutional Court has recognised that the interpretation of the right to a fair court set out by Article 92 of the Satversme may be influenced by the norms of human rights included in international human rights documents. They can help to specify the scope of the respective fundamental rights and reveal their content more precisely (*see Judgement of 3 June 2009 by the Constitutional Court in Case No. 2008-43-0106, Para 10*).

The right to fair court has been enshrined in various international human rights acts, inter alia, in Article 14 of the UN International Covenant on civil and political rights. Para 7 of the aforementioned article envisages the principle of the inadmissibility of double jeopardy as one of the guarantees, which ensures that the

right to fair court is respected. This means that the principle of inadmissibility of double jeopardy should be perceived as part of the right to a fair court.

The legal doctrine also recognises that the principle of inadmissibility of double jeopardy is one among such specific guarantees, linked with the right to case adjudication at fair court (*see: Nowak M. U.N. Covenant on Civil and Political Rights, CCPR Commentary 2nd rev. ed., N.P. Engel, Publisher, 2005, pp. 355 – 357; Weissbrodt D. The Right to a Fair Trial. Articles 8, 10 and 11 of the Universal Declaration of Human Rights. Martinus Nijhoff Publishers, 2001, pp. 74 – 75*). In legal literature this principle is described as an inalienable element of the right to a fair court, which ensures respect for the principles of legality and fairness in imposing liability upon a person for criminal law offences (*see Reid K. A Practitioner's Guide to the European Convention on Human Rights, 3rd ed., Sweet & Maxwell, 2008, pp. 108 – 110; Clayton R. and Tomlinson H. The Law of Human Rights. Oxford University Press, 2000, pp. 612 – 614*). U. Krastiņš also noted that the principle of inadmissibility of double jeopardy follows from a broader principle of law – the principle of fairness. (*see: Case Materials, p. 119*).

The Satversme does elaborate upon the specific guarantees in criminal cases, which follow from the right to a fair court, except for the presumption of innocence and the right to a lawyer's assistance. However, the interpretation of Article 92 of the Satversme provided by the Constitutional Court allows concluding that other guarantees of the kind are included in the content of the concept "fair court", used in the first sentence of Article 92 of the Satversme.

Thus, the principle of inadmissibility of double jeopardy follows from the first sentence of Article 92 of the Satversme.

12. The case was initiated regarding the compliance of the contested norms with Article 4 of Protocol no. 7 to the Convention. Abiding by Article 89 of the Satversme it can be concluded that the principle of inadmissibility of double jeopardy, insofar as it follows from the first sentence of Article 92 of the Satversme and Article 4(1) of Protocol No. 7 to the Convention, has similar legal content. To reveal the content of the fundamental right established by the first sentence of Article 92 of the Satversme as comprehensibly as possible, it should be interpreted in interconnection with Article

4 of Protocol No. 7 to the Convention, which provides: “No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.” Thus, the Constitutional Court, examining the content of and procedure for applying the principle of inadmissibility of double jeopardy, shall use the interpretation of Article 4(1) of Protocol No. 7 to the Convention provided by the ECHR and shall examine simultaneously the compatibility of the contested norms with the first sentence of Article 92 of the Satversme and the first part of Article 4 of Protocol No. 7 to the Convention.

13. The principle of the inadmissibility of double jeopardy can be attributed to the field of criminal law.

The Constitutional Court has noted several times that the concept of a criminal case in the understanding of the Convention has an autonomous meaning, which may differ from the understanding of this concept in Latvian national law (*see Judgement of 20 June 2002 by the Constitutional Court in Case No. 2001-17-0106, Para 6.1, and Judgement of 5 November 2008 in Case No. 2008-04-01, Para 10.1*). ECHR has referred to three alternative criteria, which allow establishing, whether the case has features of a criminal case (*see Judgement of 8 June 1976 by ECHR in Case “Engel et al. versus the Netherlands”, Para 81 – 82*). These criteria are as follows:

- 1) the qualification of the concrete violation of law within the national legal system;
- 2) the nature of the offence;
- 3) the compatibility or incompatibility of the sanction as to its kind or severity with criminal law.
- 4)

If only one of the aforementioned elements point to the criminal law nature of the case, then it is sufficient to recognise that a case can be equalled to a criminal case in the meaning of the Convention (*see Judgement of 20 June 2002 by the Constitutional Court in Case No. 2001-17-0106, Para 6.1*). The same approach is to

be used to assess, whether Article 4 of Protocol No 7 to the Convention is applicable to the offence (*see, for example, Judgement of 16 June 2009 by ECHR in Case "Routsalainen versus Finland", Para 43*).

Neither the administrative punishment envisaged by Section 201¹² of AVC, nor the fine envisaged by Section 32 of the Law on Taxes and Fees are considered to be criminal punishments in Latvian national law. However, sanctions for smuggling and evading taxes and other payments equalled to them are envisaged not only by Section 201¹² of AVC and Section 32 of the Law on Taxes and Fees, but also – in the presence of certain qualifying circumstances – also by Sections 190 and Section 218 of the Criminal Law. Thus, substantially both offences are of criminal law nature. Moreover, both the administrative punishment envisaged by Section 201¹² of AVC and the fine envisaged by Section 32 of the Law on Taxes and Fees have the punitive and preventive function, which complies with the aim of imposing a criminal penalty (*compare, Section 32 (5) of the Criminal Law*).

The parties to the case and the summoned persons have also expressed the opinion that both aforementioned sanctions can be equalled to criminal punishments in the meaning of the Convention.

Hence, the punishments envisaged by Section 201¹² of AVC and Section 32 of the Law on Taxes and Fees, must be examined in the contexts of the principle of inadmissibility of double jeopardy.

14. The principle of inadmissibility of double jeopardy envisages the right not to be tried and punished repeatedly for the same offence. However, it is important to establish its meaning in those cases, when a person by one action may commit several criminal offences, which have to be differentiated. The principle of inadmissibility of double jeopardy does not prohibit trying for different offences in separate proceedings, even if they follow from one set of unlawful actions (*see Harris D., O'Boyle M. and Warbrick C. Law of the European Convention on Human Rights, 2nd ed., Oxford University Press, 2009, p. 752*).

ECHR has recognised that an interpretation of Article 4 of Protocol No.7 to the Convention, which were based upon two different protected interests and qualifications of the offence in the national law, could not ensure effective application

of the principle of the inadmissibility of double jeopardy. The respective norm prohibits trying and punishing for a second offence, which is caused by the same facts or facts, which are substantially the same.

Thus, those who apply legal norms, must assess, whether the criminal offences committed by a person follow from the same actual circumstances or circumstances, which are essentially the same, i.e., whether these conditions are inseparably connected in time and space (*see Judgement of 10 February 2009 by the Grand Chamber of ECHR in Case "Sergey Zolotukhin versus Russia, Para 78 – 84*).

Thus, the principle of the inadmissibility of double jeopardy prohibits trying and punishing for a second offence, which is caused by the same facts or facts, which are substantially the same.

15. The Constitutional Court has already noted: to assess the compliance of the contested norms with the principle of inadmissibility of double jeopardy, it must be assessed, whether Section 201¹² of AVC and Section 32 of the Law on Taxes and Fees envisage liability for the same offence. To determine this, it must be assessed, whether the application of both punishments is based upon the same actual circumstances or circumstances, which are substantially the same. Thus, it is important to determine the actual circumstances, which serve as the basis for qualifying the offences envisaged by Section 201¹² of AVC and Section 32 of the Law on Taxes and Fees and the application of punishments.

Section 201¹² of AVC envisages liability for smuggling, i.e., importing into the customs territory of Latvia goods or other values subject to customs control or exporting them, evading the customs control or hiding these goods or other values from such control, or by not declaring or by using forged customs or other documents, or in other unlawful way.

Section 32 (1) of the Law on Taxes and Fees envisages liability for an offence detected by tax inspection (audit), as the result of which the amount of tax to be paid into the budget has decreased.

The *corpus delicti* of the offence is assessed to determine liability for a person's unlawful action.

15.1. The Saeima and some of the summoned persons have expressed the opinion that different legal interests are protected by the administrative punishment envisaged by Section 201¹² of AVC and the fine envisaged by Section 32 of the Law on Taxes and Fees. *The administrative punishment is applied to protect the economic interests in the field of customs operations. The fine, however, is imposed to ensure the payment of taxes into the State budget.*

By imposing the administrative punishment for smuggling, inter alia, the interests of the State to collect taxes for imported goods are protected. Thus, the conclusion drawn by the Department of Administrative Cases of the Supreme Court Senate, which was referred to also by K.Ketners, can be upheld, i.e., “the existence of customs control is not an end in itself. The aim of complying with the customs regime is, inter alia, control over the payment of taxes, moving goods across the customs border” (*see, Case Materials, p. 78, and the Judgement of 22 November 2010 by the Department of Administrative Cases of the Supreme Court Senate in Case No. SKC-428, Para 13*).

However, in accordance with the case law of ECHR, it is more important to focus upon the actual circumstances, upon which the application of concrete punishments is based, not to the congruence of the protected interests (*see Judgement of 10 February 2009 by the Grand Chamber of ECHR in Case “Sergey Zolotukhin versus Russia”, Para 78 – 84*). Hence, a total or partial congruence of the aims of application of punishment or the protected legal interests may not be considered to be decisive circumstance as the basis for assessing a possible violation of the principle of inadmissibility of double jeopardy.

15.2. The actual circumstances, upon which the application of both punishments is based, is decisive in the application of the principle of the inadmissibility of double jeopardy. Thus, among all elements of *corpus delicti* of the offence, the objective aspect of the crime, i.e., the external manifestations of a person’s behaviour, must be assessed.

To impose the administrative punishment envisaged by Section 201¹² of AVC, it must be established how a person’s unlawful actions were manifested by importing to

the customs territory of the Republic of Latvia or exporting out of it goods or other values subject to customs clearance. U.Krastiņš notes that the offence envisaged by Section 201¹² of AVC is to be considered completed as the moment it is committed. In criminal law such offences are called offences with formal *corpus delicti* (see *Case Materials*, p. 118). Thus, the actual circumstances, which are taken into consideration in imposing the administrative punishment envisaged by Section 201¹² of AVC, are to be understood as the manifestation of a person's unlawful actions, trying to transfer goods across the State border. These circumstances can be established at the concrete moment, i.e., at the moment when the person transfers or attempts to transfer goods across the State border.

In imposing the fine envisaged by Section 32 of the Law on Taxes and Fees, in its turn, the unmet tax liabilities must be established. Section 33(5) and Section 33(7) of the law "On Excise Duty" set out a person's obligation to pay excise tax, if the person performs any operations with excise goods, without complying with the regulations of the law "On Excise Duty", also if the person imports goods unlawfully into the country. The compliance of these norms with norms of higher legal force is not disputed. *Thus, at the moment of importing excise goods an obligation arises for the person to pay the tax also for these goods, irrespectively of whether these have been imported legally or illegally.*

SRS has noted that within the framework of administrative procedure, when a person is punished for smuggling, he is informed about the need to pay the excise tax, as well as about the procedure for calculating the tax and late payment penalty. Pursuant to Section 32(1) of the Law on Taxes and Fees, the fine is set in accordance with the amount of unpaid excise tax debt, which is determined as of the day when the tax inspection (audit) starts. If the natural person has paid the excise tax debt in full until the day tax inspection (audit) starts, the fine is not calculated (see *Case Materials*, pp. 122 – 123). Thus, the fact that tax liabilities have not been met for a long period after they originated, is significant in applying the fine envisaged by Section 32 of the Law on Taxes and Fees.

Thus, the actual circumstance, which is taken into consideration in imposing the fine envisaged by Section 32 of the Law on Taxes and Fees, is the fact that the person has not met his tax commitments vis-à-vis the State until the day tax inspection (audit)

starts. The offence is identified in the framework of tax inspection (audit) in accordance with the actual circumstances existing on the day when the tax inspection (audit) starts.

16. Comparison of the actual circumstances, which must be taken into consideration when imposing the administrative punishment envisaged by Section 201¹² of AVC and the fine envisaged by Section 32 of the Law on Taxes and Duties, allows concluding that the application of these punishments is not based upon the same actual circumstances or circumstances, which are substantially the same.

The administrative punishment envisaged by Section 201¹² of AVC is imposed for unlawful actions, transferring goods across the state border. The fine envisaged by Section 32 of the Law on Taxes and Duties, in its turn, is imposed for unlawful absence of action – failure to meet the obligation to pay taxes. At the moment, when a person unlawfully transfers or attempt to transfer goods across the State border, an administrative offence is committed. Even though the duty to pay taxes arises at the same time, this, nevertheless, must be differentiated from the actual circumstances, upon which the application of the fine envisaged by Section 32 of the Law on Taxes and Fees is based. The person has the possibility to fulfil his tax liabilities until the day tax inspection (audit) starts, so that fine would not be applied.

For this reason the case under examination cannot be compared with the case heard by ECHR *Ruotsalainen versus Finland*, referred to by the Applicant (*see Judgement of 16 June 2009 by ECHR in Case “Ruotsalainen versus Finland, Para 56*). In difference to the case heard by the Constitutional Court, the person had no possibility to pay the duty and to avoid imposition of the fine.

Thus, the administrative punishment envisaged by Section 201¹² of AVC and the fine envisaged by Section 32 of the Law on Taxes and Duties do not cause a violation of the principle of inadmissibility of double jeopardy, since the circumstances, upon which the application of both punishments are based, are separated in time and space.

Thus, the words “and fine in accordance with the Law on Taxes and Fees” in Section 33(5) and Section 33(7) of the law “On Excise Duty” are not incompatible with the principle of the inadmissibility of double jeopardy.

The Constitutional Court

on the basis of Section 30 – 32 of the Constitutional Court Law

held:

To recognize the words “and fine in accordance with the Law on Taxes and Fees” in Section 33(5) and Section 33(7) of the law “On Excise Duty” compatible with Article 92 of the Satversme of the Republic of Latvia and Article 4 of Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Judgement is final and not subject to appeal.

The Judgement enters into force as of the day of its publication.

The Presiding Judge

G. Kūtris